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No. 84 - 965

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

REPRINTED COPY

AIRWELD, INC.,
Petitioner,

v.

AIRCO, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Airweld's statement of the Questions Presented for Review distorts the actual holdings of the lower courts. The following sets forth correct statements of the questions raised by Airweld's petition.

I.

Whether the Ninth Circuit Court of Appeals correctly held that Airco did not violate the Sherman Act or § 3 of the Clayton Act by allegedly tying the sale of acetylene to Airweld's purchase of atmospheric gases, because there was not substantial evidence of any act of coercion or of Airco's ability to require Airweld to purchase acetylene from it during the claims period.

II.

Whether the Ninth Circuit Court of Appeals correctly held that Airco did not violate the Robinson-Patman Act by exchanging bulk oxygen and bulk nitrogen

with other gas manufacturers because there was not substantial evidence of a sale; of contemporaneous sales; of discrimination in price; or that Airweld could pay the allegedly favorable price.

III.

Whether the Ninth Circuit Court of Appeals correctly held that Airco did not violate § 2 of the Sherman Act, prohibiting attempts to monopolize, because there was not substantial evidence of a specific intent to monopolize, predatory conduct, or a dangerous probability of monopolization of the Portland market for cylinder gases.

PARTIES TO THE PROCEEDINGS

The parties in the proceedings below were Airweld, Inc., plaintiff-appellant, and Airco, Inc., defendant-appellee. Since submission of the case to the Ninth Circuit, Airco, Inc., a Delaware corporation, changed its name to The BOC Group, Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Concise Statement of the Case

Airco is a manufacturer of atmospheric gases and acetylene. Atmospheric gases include oxygen, nitrogen, and argon. They have a variety of industrial applications. Acetylene is used primarily in industrial welding applications in combination with oxygen.

Atmospheric gases are sold to users in two states. The first is the

gaseous state, generally in high-pressure cylinders. The second is the liquid state, generally in low-pressure, bulk containers.

During the early 1960's Airco was engaged in direct distribution of cylinder and bulk gases to end users in the Portland, Oregon market. Airweld purchased cylinder gases from it as a wholesaler and supplemented the distribution system. During the mid-60's, this system changed. Airco discontinued direct sale of cylinder gases in Portland; instead it sold product in bulk to Airweld, which recompressed and sold it in cylinder form to end users. Airweld also distributed bulk gases to mid-sized end users.

Airweld thus became the sole link between Airco and the Portland, Oregon market for atmospheric cylinder gases and acetylene manufactured by Airco. Airweld's control of this link continued until it

terminated its relationship with Airco effective April 1, 1976.

Airco, through its Industrial Gases Division, continued to sell bulk atmospheric gases to large industrial bulk users. Airco also entered into exchange agreements with other gas manufacturers under the terms of which the parties exchanged oxygen and/or nitrogen at locations where the participating manufacturer lacked manufacturing facilities.

(The Alleged Tying Claim)

In 1968 Airco and Airweld entered into independent, written supply agreements for acetylene and each of the bulk atmospheric gases (Exs. 5547, 5548, 5550-5553). Under the terms of these agreements, Airco agreed to sell to Airweld its requirements of acetylene and of cylinder atmospheric gases. It also agreed to sell atmospheric gases in bulk, but these were not

requirements agreements. Airweld concedes that each of these agreements is lawful on its face.

Shortly after entry into these agreements, Airweld commenced purchasing acetylene from an alternate supplier. After substantial negotiation, Airco reduced its asking price on acetylene and other atmospheric gases, and Airweld recommenced purchases of acetylene from Airco (Exs. 14, 19, 5572, 5578, 5589, 5593).

On March 12, 1973 the parties entered into a second series of four independent contracts, one covering Airweld's requirements of acetylene and the others relating to purchases of bulk oxygen, nitrogen and argon. Each agreement obligated Airco to provide Airweld's requirements of the gas covered by that agreement. Each agreement further provided that in the event Airco increased the price

of the gas subject to that agreement, Airweld could solicit its requirements from any available source; if Airweld received a bona fide offer at a better price, Airco could match that price or Airweld could purchase elsewhere. (Ex. 126, clause 16). Again, Airweld concedes that each of these agreements is lawful on its face.

The purchase of acetylene or one or more atmospheric gases from another supplier would have had no effect upon Airco's commitment to supply other gases under other contracts. Despite at least four acetylene price increases and numerous increases in the prices of other gases after March, 1973, Airweld only exercised this contractual right after one increase in the price of argon in 1975, at which time Airco agreed to lower its argon price.

(The Alleged Robinson-Patman Act Claim)

Linde and Liquid Air are manufacturers of atmospheric gases. Between 1973 and 1976 Linde had no facilities capable of competitively supplying oxygen or nitrogen to the Portland, Oregon market. During the same period Liquid Air's Portland facility was incapable of supplying its needs in this market. Airco entered into product exchange agreements with these manufacturers. Airweld contends that exchanges pursuant to these agreements constituted sales in contravention of the Robinson-Patman Act.

Linde received atmospheric gases from Airco's Vancouver, Washington plant and supplied gases to Airco from its Illinois plant, where Airco had no manufacturing capability. It was the objective of the agreement that imbalances in quantities supplied should not be

permitted to occur on any long-term basis; on termination of the agreement, an imbalance would be eliminated *solely* by provision of product (Ex. 1).

The exchange agreement between Liquid Air and Airco contemplates swaps between the Vancouver, Washington plant of Airco and the Phoenix plant of Liquid Air (Exs. 2,3). Settlement values were established if any imbalance exceeded 100,000,000 cubic feet. There is no evidence that such an imbalance ever occurred.

(The Alleged Attempt to Monopolize the Portland Market for Cylinder Gases)

In April, 1975 Airweld notified Airco of its intent not to renew the distribution contract. One year later the parties ceased to do business. Since Airweld had been Airco's sole link to the cylinder market, Airco formed a retail

store, Airco Welding Supply, to service this market.

Airco Welding Supply began soliciting sales in 1976. It had virtually no customers for cylinder gases. It commenced business with a skeleton operation: one truck and driver, two salesmen, one technical person, one clerical/bookkeeper, and no repair service (Ex. 232). It commenced operation with a modest capital investment (Tr. 829).

At this time, Airweld had an approximate 23% share of the Portland market for industrial gases and welding products (Tr. 800). Liquid Air had 35% of the market (Tr. 800). Airweld had at least 1,000 customers, 540 of whom were active accounts (Tr. 10). Many of these accounts, both cylinder and bulk, were former Airco customers who had been turned over to Airweld in the mid-1960's when Airco withdrew from the market for cylinder gas

distribution (Tr. 12, 341; Exs. 5527-29, 5532).

Not less than 250 of Airweld's accounts were required by multi-year requirements contracts to purchase all of their cylinder gas requirements from Airweld, (e.g., Exs. 6378-6610). Other competing sellers used multi-year requirements contracts which had the effect of protecting accounts from the sales efforts of competitors (Tr. 559, 608). This was Airweld's intention in entering into multi-year requirements contracts (Tr. 609).

After Airweld terminated its agreement to distribute Airco gases in Portland, Airweld offered its customers firm pricing to obtain contract renewals for multiple years and thereby avoid competition from Airco (Tr. 538). Airco could compete for the business of those customers only by offering a price below

that charged by Airweld when it increased prices -- and even then Airweld had a contractual right to retain the customer by matching the price (Tr. 610-612, 997).

Against this market background, Airweld sought to prove that Airco attempted to monopolize the Portland market for cylinder gases through predatory pricing. The evidence of Airco's price competition presented by Airweld is discussed in detail at pp. 32-35, infra.

SUMMARY OF ARGUMENT

The Alleged Tying Claim

The Ninth Circuit Court of Appeals correctly held that Airco did not violate the Sherman Act or § 3 of the Clayton Act by tying the sale of acetylene to Airweld's purchase of atmospheric gases, because there was not substantial evidence of any act of coercion or of Airco's ability to require Airweld to purchase

acetylene from it during the claims period.[1]

The Alleged Robinson-Patman Claim

The Ninth Circuit correctly held that Airco did not violate the Robinson-Patman Act by exchanging oxygen or nitrogen with other gas manufacturers, because there was not substantial evidence (a) that, on the record before the court, product exchanges or "swaps" constituted "sales" within the meaning of the Robinson-Patman Act, or (b) that even if "swaps" were sales, of contemporaneous sales, of discrimination in price, or that Airweld could pay the allegedly favorable price.

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[1]The "claims period" refers to the period in which a claim for relief is not barred by the four-year statute of limitations, 15 U.S.C. § 15B. In this case, the claims period is from and after May 19, 1973. All claims which accrued prior to that date are barred by the statute of limitations, 15 U.S.C. § 15B.

The Alleged Attempt to Monopolize Claim

The Ninth Circuit correctly held that Airco did not violate § 2 of the Sherman Act, prohibiting attempts to monopolize, because there was not substantial evidence of predatory conduct, a specific intent to monopolize, or a dangerous probability of monopolization of the Portland market for cylinder gases.

ARGUMENT

This case satisfies none of the factors regularly considered in granting a writ of certiorari. Sup. Ct. R. 17.1. The Ninth Circuit's decision does not conflict with any decision of a federal court of appeals or state appellate court of last resort, nor is it in conflict with any applicable decisions of this Court. Rather the Ninth Circuit simply applied

well-recognized principles of federal law to the evidentiary record.

A.

The Tying Claim

The Ninth Circuit applied the following correct legal standard to Airweld's evidence:

> "Three primary elements must be established in order to find an illegal tying arrangement:
>
> 1. A tie-in between two distinct products or services;
>
> 2. Sufficient economic power in the tying product to impose significant restrictions in the tied product market; and
>
> 3. An effect on a not insubstantial volume of commerce in the tied product market." 742 F.2d. at 1189.

See Jefferson Parish Hospital District No. 2 v. Hyde, ___ U.S. ___, 104 S. Ct. 1551, 1557-1561 (1984); *Roberts v. Elaine Powers Figure Salons*, 700 F.2d 1476, 1478-79 (9th Cir. 1984); *Roberts Waikiki*

U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1407 (9th Cir. 1984). Absent an express tying agreement, a plaintiff must also show that the seller of the tying product "coerced," to some degree, the purchaser into buying the tied product. *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977).

Both lower courts concluded that Airweld failed to meet this standard. The District Court concluded, "there was simply not substantial evidence of a tie during the limitations period." 576 F. Supp. at 678. The Ninth Circuit affirmed, finding that Airweld proved only the voluntary purchase of two products from Airco during the claims period and not that Airco had conditioned their sale. 742 F.2d at 1190. "Most critical," in the Ninth Circuit's view, was the lack of "any evidence from which the jury could have found that

Airco's posture in the atmospheric gas market in Portland was such that it could require Airweld to purchase its acetylene." *Ibid.*[2]

The Ninth Circuit rejected Airweld's contention that the evidence permitted a jury to find the tying claim based upon Airco's conduct years before the claims period. Specifically, the Ninth Circuit held that to prove a "continuing antitrust violation" Airweld was required, and failed, to present evidence that the well-recognized elements of a tying claim were present during any part of the limitations period. 742 F.2d at 1191. The Ninth Circuit also rejected Airweld's contention that its claimed damages were

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[2]While petitioner emphasizes the Ninth Circuit's later reference to the absence of any proof of "a corner on the . . . market. . . .", the standard applied by the Circuit Court is that applied by this Court in *Jefferson Parish Hospital District No. 2 v. Hyde*, 104 S. Ct. 1551, 1560-61.

incapable of reasonable estimation until many years after the alleged tie-in was imposed.

The record confirms the Ninth Circuit's conclusion. The only evidence introduced to show that Airco conditioned the sale of atmospheric gases upon Airweld's purchase of acetylene was the testimony of Airweld's president that, on three or four occasions between 1969 and 1972, he was told that Airweld could not remain an Airco distributor if it constructed its own acetylene plant or purchased acetylene elsewhere (Tr. 39-48, 79, 224, 426, 460-464). As both lower courts found, none of these "threats" are alleged to have been made within the claims period, i.e., after May 19, 1973.

The evidence introduced with respect to market power demonstrated that Airco lacked sufficient economic power over the alleged tying product, atmospheric

gases, to coerce Airweld to purchase acetylene.

Liquid Air was the dominant supplier of atmospheric gases (Tr. 194, 800). Linde was an important factor in the market. From at least 1974 on, Air Products commenced efforts to become a substantial factor in the Pacific Northwest and Portland markets.

While Airco and Liquid Air had the only local manufacturing facilities in Portland, exchange agreements for oxygen and nitrogen enabled Linde and Liquid Air to compete on an equal basis for the business of distributors and other end users. The competition for resellers was intense. No evidence was presented by Airweld that it ever inquired as to a competitive source of supply from 1970 until 1975; at that time Linde, Liquid Air and Air Products were falling all over

themselves to obtain Airweld's business at an agreeable price. 742 F.2d at 1191.

While Airco was committed to supply Airweld's requirements of these products, Airweld was free to secure competitive price bids whenever Airco sought to raise prices. Indeed, Airweld repeatedly was able to exact lower price increases from Airco than were being charged to other distributors and to the trade generally. Airweld's market power vis-a-vis Airco was further demonstrated by Airco's precipitous drop in market share after Airweld terminated its agreement to distribute Airco products.

Airweld seeks to avoid the lower courts' holdings that its claim is barred by the statute of limitations by contending that the "continuing violation" or "speculative damage" exceptions avoids its bar. The Ninth Circuit specifically rejected application of either the

continuing violation or speculative damage exception to the evidence presented by Airweld.

Continuing Violation Theory

Airweld incorrectly urges that the Ninth Circuit's decision with respect to the continuing violation theory conflicts with the Fifth Circuit decision in *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1041 (5th Cir. 1977). However, the Fifth Circuit holding was:

> "It also seems reasonable to us not to permit a defendant to argue that a suit to recover damages *caused by his recent acts* is barred because a prelimitation contract between himself and plaintiff *alleged to be unlawful in itself or the product of an unlawful conspiracy, purports to authorize the commission of such acts*." *Ibid.* (emphasis added)

The Fifth Circuit panel went on to conclude that it was the defendant's "own recent conduct," *ibid.*, that supported a finding of an antitrust violation within the claims period. Thus, the Fifth Circuit's holding

does not conflict with the Ninth Circuit's holding as Airweld presented no evidence of unlawful acts within the claims period.

The Ninth Circuit's refusal to apply the continuing violation exception to the facts in this case is consistent with this Court's holding in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, supra,* and in *Zenith v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and with the holding of the Fifth Circuit in *Kaiser Aluminum, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982), *cert. den.*, 459 U.S. 1105 (1983).

Speculative Damage Exception

Airweld asserts that the speculative damage exception to the general accrual rule of the statute of limitations applies. The argument is incorrect. Damages are not speculative if they may be estimated with reasonable accuracy. That damages may be more precisely determined at

some future date does not render them speculative earlier. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 64 S. Ct. 574 (1946); *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982). Both lower courts concluded that the evidence demonstrated that the damages claimed by Airweld were not speculative in years predating the claims period.

Airweld relied upon cost and production estimates projecting future savings from alternate sources, prepared in 1969 and 1971, to prove its claimed damages at trial. It is clear that if projected figures provided a reasonably accurate estimate of alleged future damages in 1969, that the same methodology could have been employed to estimate alleged future damages in each and every year thereafter. It is certainly not difficult for an established business, such as Airweld, to project its

needs a year or two into the future (as businesses do every year for budgeting purposes) and then to compare already calculated production cost estimates with a contract price.

In summary, it is clear that the Ninth Circuit correctly concluded that any tying claim would have accrued prior to the commencement of the claims period and therefore would be barred.

B.

The Robinson-Patman Act Claim

The Ninth Circuit correctly concluded that product exchange agreements between Airco, and Linde, and Liquid Air were not shown to be in violation of the Robinson-Patman Act.

The District Court held that product exchanges or swaps were not, on the record presented by Airweld, "sales" within the ambit of the Robinson-Patman Act, 576 F. Supp at 678-79; that if they were, there

was no evidence that any person paid Airco the alleged "settlement price" for oxygen or nitrogen received under product exchange agreements, *ibid.*; that Airweld could not pay the true "price" -- the trade of product sources in markets from which a manufacturer was otherwise foreclosed, *ibid.*; and that,

> "To apply the Robinson-Patman Act blindly to such arrangements would not serve to advance legitimate goals such as the spurring of competition, but would merely preclude such arrangements and the beneficial effects they have in reducing transport costs in fungible commodities." 576 F. Supp. at 679.

The Ninth Circuit agreed, noting in addition that "Airweld never proved when the sales actually occurred and therefore that they were contemporaneous to purchases." 742 F.2d at 1192.

A plaintiff in an action under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13, must demonstrate that there

were sales by a common seller to favored and disfavored customers contemporaneously. *Hiram Walker, Inc. v. ANS Tropical, Inc.*, 407 F.2d 4, 7, *reh. den.* (5th Cir. 1969).

The courts have historically construed the definition of a sale narrowly. It has no application to licensing agreements, credit transactions, or consignments.[3] As the Ninth Circuit noted, there is only one reported instance in which a plaintiff has claimed that swaps, i.e., exchanges of identical product (apples for apples) from widely disparate locations constitute sales. In *American Oil Co. v. McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975) the Tenth Circuit held

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[3] *Record Club of America, Inc. v. Columbia Broadcasting System, Inc., supra; United States v. Investors Diversified Services*, 102 F. Supp. 645, 647 (D. Minn. 1951); *Student Book Company v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955), *cert. den.* 350 U.S. 988, 76 S. Ct. 474 (1956).

that the exchanges at issue there did not constitute sales.

Linde, Liquid Air, and Airco had a unique understanding. They manufactured fungible commodities. Product borrowed in one geographic area would be returned in another. It was planned over the long term that there would be no imbalances. At the time of the swap, it was unknown whether a positive or negative balance would result at the end of an arbitrarily selected accounting period. Can a trade be accorded "sale" status ten months after its occurrence merely because there is a negative balance at that specific time?

No evidence was introduced to show that either Linde or Airco ever paid a settlement value or that either had a right to satisfy imbalances by the payment of any "price" other than the provision of product. The evidence merely reflects

month-to-month fluctuations in product owed (Jt. Ex. 5).

There was no evidence of the quantity of gases furnished to Liquid Air in the Portland market; no evidence of any imbalance that would affect the Portland market; no evidence that the 100,000 cubic foot trigger point was ever reached; no evidence that money ever exchanged hands; and no evidence that a settlement value was ever paid.

Product exchange agreements permit access to the market and foster, rather than foreclose, competition between competitors. Rather than lessening competition or tending to establish monopoly, they facilitate primary competition among manufacturers.

It is equally true that product exchange agreements could not injure competition in the Portland market. If Linde and Liquid Air had pegged the

arbitrary and unused "settlement value" at the price Airweld paid in this marketplace, no claim could be asserted by Airweld (under its artificial theory of the Act), because there neither would be an alleged "price" difference nor a difference in the pro-competitive impact of the agreement. Payments in cash by Linde, Liquid Air, or for that matter by Airco would have been, had they occurred, nothing more than a paper shuffle with no impact upon competition. Airweld's competitive position would not have changed.

Finally, the Ninth Circuit was correct in noting that Airco could not pay the "price", i.e., a fungible commodity at a distant location. A "disfavored" purchaser must be in a position to pay the allegedly favorable price. There was no evidence that Airweld was able to do so.

In summary the Ninth Circuit correctly held that, on the record in this

case, the evidence was insufficient to find these swaps were sales; furthermore, even if they were considered to be "sales", there is no evidence of contemporaneous sales or discrimination in price; and there is no evidence Airweld could offer the allegedly favorable price.

C.

The Attempt to Monopolize Claim

Airweld claimed that Airco attempted to monopolize the Portland market for cylinder gases through predatory pricing during the period after Airweld terminated its agreements with Airco effective April, 1976. Finding Airco to be "a new entrant in the Portland market, with no customers," 576 F. Supp. at 680, the District Court concluded that Airweld's alleged evidence demonstrated nothing more than "the very essence of lawful competition." *Ibid.*

> "This is far from a case where pricing was below

> average variable cost or average total cost . . . . It appears that the entry of [Airco] into the Portland market merely reduced Airweld's profit margin on some orders. This is what competition, specifically price competition, is all about." *Ibid.*

The District Court concluded that there was not sufficient evidence to find any of the well-recognized elements of an attempt to monopolize.

The Ninth Circuit affirmed stating that:

> "Below average total cost pricing, without more, is not the kind of conduct that will support a finding of attempted monopolization by a firm without market power." 742 F.2d at 1194.

The Ninth Circuit simply held that evidence that a new market entrant with a *de minimis* market share lost money -- and therefore arguably sold products at prices "below total cost" -- does not present substantial evidence of an attempt to monopolize. The Ninth Circuit's holding comports with

common sense and conflicts with no decision of this Court or any of the Circuit Courts of Appeal.

A review of the challenged conduct of Airco for each of the years 1976 through 1979 confirms the Ninth Circuit's conclusion that there was not substantial evidence of attempted monopolization.

Airweld's allegations for the year 1976 consisted of challenged prices to seven customers over the course of the year (Ex. 1278). Airweld matched Airco's price quotation and retained each customer. At the prices quoted by Airco, excluding any consideration of subsequent price increases, Airweld's *net profit* for the claim period to these seven customers was $34,000 on gross sales of only $75,000 (Ex. 1266; Tr. 1462-86, 1689-90, 1696-98). None of the price quotes offered by Airco was below Airweld's total cost (Tr. 1597). Airweld's gross margin increased 20% from

the prior years (Tr. 1633), while its gas sales were almost forty times that of Airco's scratch start venture (Ex. 1270).

The alleged predatory pricing to Airweld customers for the year 1977 consisted of prices offered by Airco to two Airweld customers and Airco's bid in response to a solicitation. Again Airweld matched Airco's quotes and retained the customers. Airweld's net profit on sales to the two customers at the alleged predatory price was $5,923 on gross sales of only $9,182. In 1977, Airweld's gas sales increased almost 20% over the prior year to $2,488,052 (Ex. 1266). In contrast, Airco's retail store had cylinder gas sales of $155,964 (Ex. 127).

Airweld's evidence for 1978 consisted of offers by Airco to seven Airweld customers. Again, all of the Airco offers were at prices profitable to Airweld, which had an established customer

base, at the prices quoted by Airco (Tr. 1597, 1194-1195). Airweld's gas sales for 1978 increased over 25% to $3,290,611 (Ex. 1266) while Airco's sales of cylinder gases reached $266,297 (Ex. 1270). At this level of sales -- 8% of Airweld's Portland gas sales -- Airco's retail store earned a profit selling at the challenged prices when viewed as an independent profit center (Ex. 239).

The only evidence for 1979 was price quotations submitted to Zidell Exploration by Airweld and Airco. Airweld's price quote was below Airco's quote for every product offered, by as much as 60% (Tr. 887; Ex. 1278).

There was thus no evidence to support any inference that the prices offered from 1976 through 1979 were anything but a legitimate competitive response to market conditions.

Nor does the evidentiary record presented by Airweld provide an appropriate record against which to apply any cost-based evidentiary standard in an alleged predatory pricing case. Airweld presented no testimony concerning Airco, Inc.'s cost of manufacturing and re-compressing atmospheric gases prior to delivery to its retail store for distribution. Airweld presented no expert testimony concerning: (a) the appropriate allocation of manufacturing, distribution, or operating expenses between the various products sold by Airco, Inc.'s retail store; (b) the total, fixed, or variable costs incurred by Airco or its retail store in selling cylinder gas or other products; or (c) Airco's total, fixed or variable costs of production at reasonably anticipated sales levels sought by a new entrant. Because Airweld's president acknowledged that the prices Airco, Inc.

offered the 17 recipients of alleged predatory prices had no effect on the prices which Airweld charged its other 523 regular accounts (Tr. 140), Airweld's deficient evidence of any cost-price relationship precludes a finding of anti-competitive intent based upon otherwise pro-competitive conduct.

In summary, the Ninth Circuit correctly concluded that Airweld failed to present substantial evidence of any of the well-recognized elements of an attempt to monopolize.

CONCLUSION

Airweld's petition for certiorari should be denied. The Ninth Circuit decision correctly applies federal law, presents no novel federal issue which should be decided by this Court, and does not conflict with any decisions of this Court or the Courts of Appeal.

Discretionary review of the legal principles applied by the Ninth Circuit against the deficient and ambiguous evidentiary record presented by Airweld is unwarranted.

Respectfully submitted,

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